STATE OF MICHIGAN

COURT OF APPEALS

CHARLES KERLIKOWSKE, a/k/a/ BUD KERLY and SHIRLEY R. KERLIKOWSKE,

Plaintiffs-Appellees,

v

VILLAGE OF STEVENSVILLE,

Defendant-Appellant.

UNPUBLISHED
September 28, 1999

No. 206717
Berrien Circuit Court
LC No. 95-003829 CZ

Before: McDonald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right a judgment of the circuit court awarding plaintiffs $70,000 damages on their claims of innocent misrepresentation and mutual mistake of fact. We reverse in part and affirm in part. We affirm the award of damages on the basis of mutual mistake.

I

This case arises from plaintiffs' donation of a ten-acre parcel of land in Stevensville to defendant in 1978 and 1979 for construction of a public park. Defendant later decided not to build the park and, in 1991, listed the property for sale. Plaintiffs sought return of the property, contending that their original agreement with defendant was that the property would be returned should the park not be constructed. Defendant offered to convey the property back to plaintiffs if plaintiffs paid the property taxes that would have accrued during the ten to fifteen years that defendant held the property. Plaintiffs declined the offer and filed this action in circuit court to regain the property or for damages. Following a trial, the court awarded plaintiffs $70,000 damages, on their claims of innocent misrepresentation and mutual mistake of fact.

II

Defendant first claims that the trial court's finding of innocent misrepresentation was erroneous as a matter of law because the alleged misrepresentations related to future possibilities and cannot be the basis for a misrepresentation claim. We agree.

We review questions of law de novo. *Bennett v Weitz*, 220 Mich App 295, 299; 559 NW2d 354 (1996). Whether the evidence fails to support a claim becomes a question of law where there is a total failure to prove an element necessary to a cause of action. *In re Motion for Leave to Sue Receiver of Venus Plaza Shopping Center*, 228 Mich App 357, 360; 579 NW2d 99 (1998).

To prevail on a claim of innocent misrepresentation, a party must show detrimental reliance on a false representation such that the injury inures to the benefit of the party making the misrepresentation. *Forge v Smith*, 458 Mich 198, 211-212; 580 NW2d 876 (1998). It is well settled that, to be actionable, a misrepresentation must relate to an existing or a past fact and not to future possibilities. *Roy Annett, Inc, Kerezsy*, 336 Mich 169, 172; 57 NW2d 483 (1953); *Gervais v Annapolis Homes, Inc*, 29 Mich App 378, 386; 185 NW2d 422 (1971). A promise concerning the future cannot form the basis of an innocent misrepresentation claim. *Forge, supra* at 211-212.

The trial court found that defendant represented that the "donated property would be used for a park" and such was a misrepresentation of the ultimate use of the property, which was never developed as a park. We agree that the representations regarding the property's future use were promissory in nature. A finding of misrepresentation on the basis of defendant's future use of the donated property was in error.

Further, we find no misrepresentation of a past or an existing fact to support plaintiffs' claim of innocent misrepresentation. Defendant's promise that the property would revert to plaintiffs in the event that a park was not constructed, likewise relates to a future act. Although defendant's attorney at the time of the donation misrepresented that defendant was required to use the property for a park and could not sell the property if it failed to do so, this representation was, in essence, a legal opinion; a statement regarding a matter of law generally may not be a basis for a misrepresentation claim. *City Nat'l Bank of Detroit v Rodgers & Morgenstein*, 155 Mich App 318, 323-325; 399 NW2d 505 (1986).

Because we find that plaintiffs' claim of innocent misrepresentation fails as a matter of law on the basis that the representations did not relate to a past or an existing fact, we need not address defendant's second contention, i.e., that plaintiffs' innocent misrepresentation claim fails because plaintiffs' injury did not inure to the benefit of defendant. We note, however, that we find no error in the court's finding that this element was met. The innocent misrepresentation rule applies in circumstances where "the defendant obtained what the false representations caused the plaintiff to lose." *Aldrich v Scribner*, 154 Mich 23, 28; 117 NW 581 (1908). Plaintiffs donated a $75,000 parcel of property to defendant. Defendant subsequently sold the property for $70,000. Thus, plaintiffs' loss became defendant's gain when plaintiffs deeded the property to defendant.

III

Defendant next argues that the parties' mistaken belief that defendant had "irrevocably committed itself" to constructing a park cannot serve as a basis for a claim of mutual mistake of fact because it is a promise for future performance. A mistake of fact claim must involve a belief related to a fact in existence at the time the contract is executed; the belief "may not be, in substance, a prediction as

to a future occurrence or non-occurrence." *Lenawee Co Bd of Health v Messerly*, 417 Mich 17, 24; 331 NW2d 203 (1982); see also *Britton v Parkin*, 176 Mich App 395, 398; 438 NW2d 919 (1989).

A

The trial court found that "both parties were of the mistaken belief that [defendant] had irrevocably committed itself to the development of a park on the donated land." Defendant contends that this mistake is, in substance, a prediction about the future. However, the parties did not merely believe that defendant's irrevocable commitment was promissory in nature. The parties' belief is more accurately viewed as a belief that defendant's rights to the property were restricted, from the moment of the donation. That is, defendant had an existing, binding and continuing obligation to use the property for a park or return it to plaintiffs. In substance, the mistaken belief of defendant's irrevocable commitment equates to a belief that defendant's legal rights were restricted.

The trial court's factual findings and the testimony support the conclusion that the parties believed not that defendant merely promised to use the property for a park, but that defendant could not do otherwise. The trial court cited the testimony of plaintiff, Charles Kerlikowske ("Kerlikowske"), regarding a meeting that he, Art Kasewurm, the then-village mayor, and another council member had with the then-village attorney, Tom Adams, where they discussed defendant's obligations regarding the property. The trial court noted:

> that the then-Village attorney represented to [Kerlikowske] that [defendant] was required to use the property for a park and could not sell the property if it failed to do so, causing [Kerlikowske] to believe that it was unnecessary to put any limiting language in the deeds of conveyance to [defendant].

Kerlikowske's testimony, referenced by the court, was as follows:

> Tom Adams was the village attorney at the time. And at that meeting I recall Kasewurm saying that, "I've promised Bud that if we don't make a park that we'll give him the property back." And Tom Adams said, "That isn't necessary, because by statute if they don't make a park, they can't sell it anyhow. So the village will always have it." And I said, "okay. Then we don't have to put anything in there."

Thus, the parties' belief of an irrevocable commitment was not simply founded on a promise of defendant. They believed that defendant could not sell the property. Evidence was also adduced of similar beliefs on the part of other council members at the time of the donation. Evidence of this common understanding, both testimony and exhibits, was cited by the trial court in its factual findings.

In this case, the parties' mistaken belief fundamentally related not to what defendant "would" do, but what defendant "could" do. This was a fact in existence. Plaintiffs' claim of mistake of fact does not fail on the ground that it related to a promise regarding future conduct.

B

Even though the parties' mistaken belief could be viewed as relating to a matter of law, we note that Michigan courts have long recognized equitable principles which allow relief for a mistake of law under certain circumstances. 17 Michigan Civil Jurisprudence (1998 rev vol), Mistake and Ignorance of the Law, §§ 9-16, pp 518-528. Relief may be granted where a party is mistaken as to his antecedent and existing private legal rights, interests, or estates. *Renard v Clink*, 91 Mich 1, 3; 51 NW 692 (1892); 17 Michigan Civil Jurisprudence, *supra*, § 13, pp 524-525. Further, Michigan courts have long allowed restitution on a theory of unjust enrichment, whether for a mistake of fact or a mistake of law. 17 Michigan Civil Jurisprudence, *supra*, § 16, pp 527-528.

> "'The important question was not whether the mistake was one of law or fact, but whether the particular mistake was such as a court of equity will correct, and this depends upon whether the case falls within the fundamental principle of equity that no one shall be allowed to enrich himself unjustly at the expense of another by reason of an innocent mistake of law or fact entertained by both parties.'" [*Lowry v Collector of Internal Revenue*, 322 Mich 532, 541; 34 NW2d 60 (1948), quoting *Moritz v Horsman*, 305 Mich 627, 634; 9 NW2d 868 (1943), quoting *Reggio v Warren*, 207 Mass 525, 534; 93 NE 805 (1911).]

The trial court recognized that "the doctrines of innocent misrepresentation and mutual mistake are based upon preventing unjust enrichment." The court found that plaintiffs donated, and defendant accepted, the property on the basis that defendant must use the property for a park or return it to plaintiffs. Defendant was subsequently unjustly enriched when it sold the property. Whether a party is entitled to relief in equity is decided on a case-by-case basis. *Lowry*, *supra* at 545. In this case, the trial court properly determined that plaintiffs were entitled to relief.[1]

IV

Defendant next claims that the trial court's finding that defendant had irrevocably committed itself to the development of the park was clearly erroneous. A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 171; 530 NW2d 772 (1995).

Evidence supporting the court's finding was discussed, *supra*. The trial court relied on Kerlikowske's testimony that the then-village attorney represented to Kerlikowske, Kasewurm, and another council member that defendant "was required to use the property for a park and could not sell the property if it failed to do so." Kerlikowske testified that Kasewurm told the then-village attorney that the property would be returned if the park was not developed. Testimony from other witnesses, and several letters admitted into evidence, also supported the finding that defendant believed that it was irrevocably committed to constructing a park on the donated property, or, alternatively returning the property. Bernice Schoenfelder, former village clerk, testified at trial that Kerlikowske donated the ten acres of property to defendant for a park, that the donation was discussed at village council meetings,

and the understanding was, if the property was not used as a park, it was to be returned to Kerlikowske. Kevin Green, a former employee of defendant, corroborated Schoenfelder's testimony that at council meetings, during the time of plaintiffs' donation, it was discussed that if the park was not built, defendant would return the property.

A review of the evidence does not result in a definite and firm conviction that a mistake has been made. The trial court's finding that defendant believed it made an irrevocable commitment to developing a park on the donated land was not clearly erroneous.

V

Defendant next claims that the trial court erred as a matter of law in failing to make a determination as to which of two blameless parties should be required to bear the burden of the alleged mistake of fact. In exercising its equitable powers in cases of mistake, a court is required to determine which of two blameless parties must assume the loss resulting from the shared misapprehension. *Dingemen v Reffitt*, 152 Mich App 350, 357; 393 NW2d 632 (1986). In balancing the equities, a court must examine its notions of what is reasonable and just under all the circumstances. *Id*.

In the hearing on the motion for summary disposition, the trial court expressly stated that the equities were on plaintiffs' side. Further, the court's balancing of the equities is implicit in the court's decision that plaintiffs were entitled to damages in the amount of the fair market value of the property conveyed. The trial court did not fail to consider which of the two parties should be required to bear the burden of the mutual mistake.

VI

Finally, defendant claims that the trial court's award of damages in the amount of $70,000 was clearly erroneous. We disagree.

This Court reviews an award of damages under the clearly erroneous standard. *Triple E Produce Corp*, *supra* at 177. Where this Court finds that a trial court was aware of the issues and correctly applied the law, no clear error will be found if the award of damages is within the range of the evidence. *Id*.

Evidence was admitted at trial showing that the fair market value of the property was $75,000 at the time it was donated. Defendant sold the land for $70,000. The trial court's award of damages of $70,000 was within the range of the evidence and, therefore, was not clear error.

With regard to defendant's claim that the trial court failed to consider that plaintiffs reaped substantial tax savings, defendant's contention is without merit or irrelevant. Plaintiffs did not have control or use of the property during the period it was held and used by defendant; there is no justification for defendant to recoup property taxes from plaintiffs for this period. Thus, plaintiffs had no property tax savings. With regard to income tax savings, there was no evidence of the amount of actual tax savings to plaintiffs, if any, from the property donation. Regardless, it is not the court's role to determine the overall tax implications to plaintiffs. Plaintiffs presumably would account for any return of

their donation upon receipt, in the tax year received, thus addressing any earlier tax benefit pursuant to the tax laws. With regard to defendant's claim of costs associated with the donated property, these costs were incurred as a matter of choice by defendant. Defendant's improvement costs apparently were after the fact and related to the development of the subdivision; therefore, they are irrelevant to the instant action.

Reversed in part, affirmed in part.

/s/ Gary R. McDonald
/s/ Janet T. Neff
/s/ Michael R. Smolenski

[1] We note that any seeming contradiction in our conclusion that relief in this case is proper on a theory of mistake, but not on a theory of misrepresentation is explained by distinguishing the particular facts at issue with regard to each theory. Plaintiffs' misrepresentation claim fails because the representation that the property would be used as a park is a future promise, and the parties' mistaken belief of defendant's irrevocable commitment to a park relates to a matter of law, i.e., a belief that defendant could not sell the property because its legal rights were restricted pursuant to statute, neither of which may support a misrepresentation claim. However, the parties' latter belief, even though a mistake of law, is grounds for equitable relief on the basis of mistake.